No. 15411

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN J. MOYLAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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APPELLANT'S PETITION FOR A REHEARING.

To the United States Circuit Court of Appeals for the Ninth Circuit and to the Honorable Circuit Judges, Chambers and Barnes, and District Judge, James J. Walsh:

John J. Moylan, appellant in the above described appeal, respectfully petitions the court for a rehearing after decision rendered August 8, 1957.

The original hearing in this matter was had on June 7, 1957, with decision as above.

Summary Statement of Grounds Upon Which a Rehearing Is Requested.

I.

In his opinion Judge Chambers stated that any possible defect as to the lack of consent of the government to be sued in the case herein, should be disclosed even now.

Appellant, anticipating the possibility of a review of this decision by the Supreme Court of the United States, respectfully requests this Honorable Court to rule on that point. Appellant instituted this action in the District Court on the theory of an express contract and also on the theory of a contract implied in fact, for which he asked reasonable compensation for his services. HAS THE U. S. GOVERNMENT CONSENTED TO BE SUED IN THE CASE HEREIN?

Appellant respectfully submits that the government has consented to be sued.

28 U. S. C., Sec. 1346(a)(2);

United States v. Minnesota Mutual Invest. Co., 271 U. S. 212;

54 Am. Jur. 576, Sec. 66.

II.

Appellant at page 8 of his brief made the following statement:

> "It is illogical to contend that in the same transaction an officer has authority to bind appellee to pay the carrier and the expenses of the forwarding agent, but has no authority to bind appellee for compensation of the forwarding agent in handling the shipments."

Appellant respectfully submits that this Honorable Court erred in failing to rule on the authority of Mr.

Salisbury to employ appellant as a freight forwarder. Appellant urges that it is mandatory to make such a ruling for if Mr. Salisbury committed an unauthorized act in using appellant's services, the payment of appellant's expenses by appellee constituted an unlawful disbursement of public funds.

III.

Appellant respectfully submits that there was a unilateral contract formed between appellant and appellee. In the event Mr. Salisbury acted without authority, appellee's acceptance of the benefits of appellant's performance and the payment of appellant's expenses, ratified the acts of Mr. Salisbury in using the services of appellant as a forwarding agent.

IV.

Appellant respectfully submits that this court erred in failing to discuss the case of *Smale and Robinson, Inc. v. United States* (1954), 123 Fed. Supp. 457. If Mr. Salisbury had authority to employ appellant as a forwarding agent he was *lawfully authorized to direct the course of conduct of the United States during a particular transaction.* This authority will work estoppel against the appellee. Appellant submits that the sole citation in the opinion (*Federal Crop Insurance v. Merrill,* 332 U. S. 380) is inapposite to the case herein. Appellant concedes that he risked the extent of Mr. Salisbury's authority in dealing with the government. However, at the trial appellee produced no evidence that there is a published rule or regulation prohibiting Mr. Salisbury from using the services of private freight forwarders, nor did appellee introduce any evidence whatsoever showing the lack of authority by Mr. Salisbury to use appellant's services. Appellant re-

spectfully poses the following question: WHERE IN THE INSTANT CASE IS THERE TOO MUCH OF 332 U. S. 380, TO PRECLUDE A RECOVERY IN THE CASE HEREIN?

V.

Appellant respectfully submits that this court erred in finding that the trial court was given no proof that during the period involved there was a uniform rate paid by the shippers. It is a matter of common knowledge that the brokerage fee of a forwarder is included in the rate charges by a carrier. Testifying before a Congressional Committee investigating the activities of foreign freight forwarders, Arthur G. Wildberger, freight traffic officer for General Services Administration stated: "Carriers have figured brokerage in their rates and in my opinion, would never reduce them." (House of Representatives, Union Calendar No. 2939, p. 32.)

The payment of brokerage by the Conference starting 1951, was not voluntary, but was the result of an order of the Maritime Commission (3 U.S.M.C., Docket No. 657) which compelled steamship companies on the Pacific Coast to remove prohibitions against payment of brokerage to forwarders on Pacific Coast shipments. This order of the Maritime Commission was upheld by the Federal Courts in the following cases:

Atlantic & Gulf West Coast, etc. v. United States, 94 Fed. Supp. 138;

Pacific Westbound Conference, et al. v. United States, 94 Fed. Supp. 649.

Although the carrier paid the brokerage to the forwarder from freight charges received by the carrier, it was the shipper who paid the uniform rate of 1¼% of the ocean freight charge whenever he used the services of a carrier.

VI.

At page 2 of the decision herein Judge Chambers stated:

> "The pattern of the Pacific Conference just did not mesh with the government's plan of doing business and it took three years to remodel the Pacific Conference's and the government's contract machinery."

During this period all the conference required was the certification by the shipper that the forwarder was acting as the shipper's forwarder. The Rules of the Conference have not been changed as the certification is still required. It did take the government three years to add the word "tentative" to its bookings. This ponderous, bureaucratic action by appellee should provoke on honorable men justifiable criticism.

VII.

Appellant respectfully submits that this court erred in failing to determine the reasonable value of appellant's services pursuant to established rules of law. Judge Chambers in his decision states: "Here there was a justifiable reason for the trial court to reject the higher figure." In *quantum meruit* recovery, claimant is entitled to reasonable compensation for his services. The majority, and only rule of law pertaining to the determination of reasonable compensation is:

> "Reasonable value of services rendered would be what was the reasonable price paid for such service or like services in the community where such services or like services were rendered." (*Gray v. Cheatham,* 52 S. W. 2d 762, 763.)

Appellant respectfully submits that if there was a justifiable reason for the trial court to reject the higher figure, it should have also rejected the lowest figure available, and determined the reasonable value of appellant's services on

the basis of cost to industry for similar services. Mr. Salisbury in a letter to the Office of the Comptroller, *in re,* The Moylan case, stated:

> "It is therefore our opinion that such value is more equitably established by a comparison with the cost of such services performed for industry, rather than the lowest contract figures which the Government may over a period of years obtain thru the medium of competitive bidding." [Report of Investigation of the Use of Private Freight Forwarders, March, 1955, Exhibit No. 21, Sheet 7.]

Conclusion.

Appellant respectfully submits that appellant herein rendered valuable service to the government at its request, the benefits of said services having been accepted by the government. Whether the liability of the government be founded on an express contract or *quantum meruit,* appellant is entitled to the reasonable value of his services and such value should be determined by this Honorable Court pursuant to established principles of law. It is the duty of a reviewing court to hand down definitive answers to all questions presented for review. Generalities in an opinion do not serve to establish precedents or affirm recognized rules of law.

Only a granting of a rehearing and the reversal of the decision of August 8, 1957, can undo the injustice done appellant.

Dated at Los Angeles this 22nd day of August, 1957.

THOMAS J. GATELY,

Attorney for Appellant.

Certificate of Counsel.

I hereby certify that I am counsel for the appellant in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law and in fact, as well, and that said petition is presented in good faith and is not interposed for delay.

Dated at Los Angeles this 22nd day of August, 1957.

THOMAS J. GATELY,
Attorney for Appellant.